

Opinion No. 117.

**Offices and Officers—County Officers
Clerk of the District Court—Military
Service.**

Held: A person appointed to the office of clerk of the district court following the entrance into military service of the regularly elected clerk holds that office until the regularly elected clerk applies for restoration to the of-

office, during the term for which he was elected, under the provisions of Chapter 47, Laws of 1941. If the person returning from military service does not apply for restoration to the office under the provisions of Chapter 47, no vacancy is thereby created in the office during the term.

January 28, 1946.

Mr. Otto C. Hansen, Chairman
Board of County Commissioners
Mineral County
Superior, Montana

Dear Mr. Hansen:

You have requested an opinion on the following set of facts:

In February of 1945, the board of county commissioners of Mineral County appointed "X" to the office of clerk of the district court. At the time of appointment, the regularly elected clerk of the district court was on duty with the armed forces of the United States; and the appointment provided "X's" term expires upon the return of (the regularly elected clerk of the district court) from the armed forces of the United States.

The regularly elected clerk has now returned from the armed forces, has not sought restoration to the office in accordance with the provisions of Chapter 47, Laws of 1941, and has in fact filed a "resignation" as clerk of the district court.

Does the board of county commissioners now have the authority to appoint some person other than "X" to the office of clerk of the district court?

Chapter 47, Laws of 1941, which provided for reemployment of elected officers and employees of the state and its political subdivisions upon the completion of their training and service in the military forces of the United States, was an act passed for the purpose of giving some measure of security to individuals in public service who left their positions for active military service.

Section 7 of Chapter 47 provides in part:

"... the board of county commissioners in the case ... county ... officers ... shall appoint an 'acting' officer to temporarily replace any elected officer, designated in paragraph (b) of Section 1, who shall enter military service in the manner set forth in Section 1 of this act. 'Acting' officers so appointed shall be appointed for a period not to exceed the unexpired term of the officer whose duties he assumes and such appointment shall be subject to the right hereinafter set forth of the elected officer to the restoration of his position." (Emphasis mine.)

The Montana Supreme Court considered Chapter 47, Laws of 1941, in the case of *Gullickson v. Mitchell*, 113 Mont. 359, 126 Pac. (2d) 1106; and there the court pointed out specifically "what the officer retains during his absence is not the office, nor even the title to it, but the mere right to be 'restored to his official position' (section 5) upon complying with the provisions of section 3 of the act." During his absence in military service the person elected to the office "has not held the office or the title, but merely the inchoate right to be restored to them."

Hence, the purported "resignation" of the person who has returned from military service becomes nothing more than a formal statement to the effect he does not intend to exercise his inchoate right to be restored to office in accordance with the provisions of Chapter 47, Laws of 1941.

On page 367 of the Montana Report of the *Gullickson* case, our court used language indicating the person who was appointed to and accepted an office rendered temporarily vacant by the military service of the regularly elected official succeeded to the office with no conditions attached to impair his official function or to limit his tenure—except the condition created by Chapter 47 to the effect the person in military service could seek restoration upon discharge from such service if he returned during the term for which he was elected and complied with the provisions of Chapter 47:

"It (section 3 of the act) does not speak of the officer's seeking restoration of the duties and emoluments from which he has been on leave; it speaks of 'persons seeking restor-

ation to an elective office,' thus indicating that the person has not meantime held the office or the title, but merely the inchoate right to be restored to them. Any other view would involve a queer result if the person should not 'seek restoration' to his office within the forty-day period after relief from military service. Could it be considered that up to that time he was the attorney general, although on leave of absence from the duties of his office, but that he then lost the title? Could it be considered that up to that time the plaintiff was 'acting attorney general' but thereupon became 'attorney general'? The conclusion is inescapable that what the elected officer loses by failing to avail himself of the benefits of section 3 within time, is not the office, but the right to be restored to it; and that what the appointed officer holds during the entire period of his incumbency is the office itself, for his occupancy never changes . . ." (Emphasis mine.)

It is my opinion a person appointed to the office of clerk of the district court following the entrance into military service of the regularly elected clerk holds that office until the regularly elected clerk applies for restoration to the office, during the term for which he was elected, under the provisions of Chapter 47, Laws of 1941. If the person returning from military services does not apply for restoration to the office under the provisions of Chapter 47, no vacancy is thereby created in the office.

It appears, however, that the present incumbent is willing to resign, thus creating a vacancy, and then the board of county commissioners will appoint some suitable person to such office. In the event the present incumbent does resign, such resignation exonerates her bondsmen and herself from any future liability and responsibility of the office.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General